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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Madison Power, a minor, by and through)
10 Kelly and Lisa Power, her parents and)
guardians,

11 Plaintiff,

12 vs.

13 Gilbert Public Schools, *et al.*,

14 Defendants.
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No. CV 07-2584-PHX-JAT

ORDER

18 Pending before the Court is Defendants' Motion for Summary Judgment (Doc. #79).
19 Defendants moved for summary judgment on all remaining claims – the Title IX claims
20 against the Gilbert Public School District and the §1983 claims against all Defendants. For
21 the reasons outlined below, the Court will grant the Motion.
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23 **I. BACKGROUND**

24 **A. Factual Background**

25 Plaintiff Madison Power attended Mesquite High School and played on the girls'
26 varsity basketball team during the 2005-2006 season as a sophomore. At that time,
27 Defendant Candice Gonzales was the head coach of the basketball team, and her husband,
28 Defendant Josh Gonzales, was the assistant coach. Over the winter break of that school year,

1 Madison and five other players rode home from a basketball tournament in a vehicle driven
2 by Mr. Gonzales. During the car ride home, Mr. Gonzales made some comments of a sexual
3 nature.

4 Mr. Gonzales's comments made Madison uncomfortable, so she discussed them with
5 her parents. Eventually, after receiving advice from Mary Lou Padilla, a teacher at Mesquite
6 High School, Madison reported Mr. Gonzales's comments to the Mesquite administration.
7 Ms. Padilla also reported the comments to Mr. O'Neill, the athletic director at the time.
8 Based on Madison's report, the Gilbert School District ultimately decided not to renew Mr.
9 Gonzales's coaching contract for the 2006-2007 school year.

10 Madison alleges that the day after she made her report, Ms. Gonzales called the other
11 varsity players and told them that Josh would "never say anything like that." Ms. Gonzales
12 allegedly asked at least one player, Brittany Foster, to report back to her regarding the actions
13 of the Powers family. Madison further claims that after Mr. Gonzales was fired, Ms.
14 Gonzales kept Madison out of basketball activities during the summer of 2006. Ms.
15 Gonzales told a parent that Madison should not have the nerve "to show up in her gym
16 again." Madison did not receive an informational flyer about the 2006 summer programs,
17 but Ms. Gonzales did not send a flyer to anyone.

18 After the other varsity players found out about Madison's reporting of Mr. Gonzales's
19 behavior, some of the girls allegedly began threatening Madison. During weight training
20 M.S., a member of the varsity team, was heard threatening to be more aggressive toward
21 Madison in practice, and later made a late hit on Madison. Another varsity player wrote on
22 her MySpace page that Madison was a "bitch." On the bus, varsity players would stick their
23 feet up to prevent Madison from walking down the aisle and would occasionally try to trip
24 her. Once, as Madison walked down the hallways of the high school, K.L., another varsity
25 player, pointed at Madison and said, "stupid bitch." On another occasion, several members
26 of the varsity team walked behind Madison and stepped on her flip-flops, almost causing
27 Madison to trip.

1 For the first time ever, Mesquite conducted closed girls' basketball tryouts for the
2 2006-2007 season. The windows to the gym were covered. When Ms. Padilla attempted to
3 attend tryouts to provide moral support for Madison, coaches and the principal expressed
4 their displeasure. On the second day of tryouts, Defendant Dominic Marchiando, the
5 principal of Mesquite High School, told Ms. Padilla that tryouts were closed to all staff
6 members other than coaches.

7 Ms. Gonzales recused herself from the selection process for the 2006-2007 teams.
8 The coaches who selected the teams for that season were: Greg Ream, the new varsity
9 assistant coach; Jim Lavin, the junior varsity head coach; Evelyn Fox, the junior varsity
10 assistant coach; Barbara Smith, the freshman head coach; and Megan Abrams, the freshman
11 assistant coach. Those coaches rotated around the various courts to observe and evaluate
12 each girl. After tryouts, the coaches conferred outside of the presence of Ms. Gonzales
13 regarding the selections. The coaches determined that Madison should play for the junior
14 varsity team.

15 Madison played on the junior varsity team for the 2006-2007 season and did not suffer
16 harassment from any of the other junior varsity players. Nonetheless, because of her
17 negative experiences with Ms. Gonzales and some of the varsity players, she decided not to
18 try out for the 2007-2008 season.

19 **B. Procedural Background**

20 Plaintiff filed this suit on December 19, 2007. She filed a First Amended Complaint
21 (Doc. #22) against all Defendants on April 10, 2008. In Count One of the First Amended
22 Complaint, Plaintiff alleged that Defendant Gilbert Public schools knew about Candice
23 Gonzales's and the players' "harassment of and retaliation toward" Plaintiff, but responded
24 with deliberate indifference; thereby violating Title IX of the Educational Amendments of
25 1972 ("Title IX"). (Doc. #22, p. 9). In Count II, she alleged that the Defendants violated 42
26 U.S.C. §1983 by depriving her of her constitutional right to equal protection, free speech,
27 substantive due process, and procedural due process, as well as her statutory right to equal
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1 access to education under Title IX.

2 Defendants moved to dismiss certain claims on April 17, 2008 (Doc. #27). The Court
3 granted the Motion to Dismiss with regard to Plaintiff's §1983 claims against the Defendants
4 based on violations of Title IX and the Equal Protection Clause as well as the Title IX claims
5 against the individual Defendants. (Doc. #34). After the Supreme Court handed down its
6 decision in *Fitzgerald v. Barnstable School Committee*, 129 S.Ct. 788 (2009), the Court
7 invited Plaintiff to file a motion to reconsider the Court's earlier dismissal of her §1983
8 claims (Doc. #65).

9 Plaintiff filed her Motion for Reconsideration on February 27, 2009 (Doc. #68). On
10 March 31, 2009, the Court granted the Motion to Reconsider to the limited extent that the
11 Court reversed its earlier holding dismissing Plaintiff's §1983 equal protection claims and
12 reinstated those claims. (Doc. #75.) Defendants filed their pending Motion for Summary
13 Judgment seeking judgment on all remaining claims on June 25, 2009. (Doc. #79.)

14 **II. LEGAL STANDARD**

15 Summary judgment is appropriate when "the pleadings, depositions, answers to
16 interrogatories, and admissions on file, together with affidavits, if any, show that there is no
17 genuine issue as to any material fact and that the moving party is entitled to summary
18 judgment as a matter of law." Fed.R.Civ.P. 56(c). Thus, summary judgment is mandated,
19 ". . . against a party who fails to make a showing sufficient to establish evidence of an
20 element essential to that party's case, and on which that party will bear the burden of proof
21 at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

22 Initially, the movant bears the burden of pointing out to the Court the basis for the
23 motion and the elements of the causes of action upon which the non-movant will be unable
24 to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to the non-
25 movant to establish the existence of material fact. *Id.* The non-movant "must do more than
26 simply show that there is some metaphysical doubt as to the material facts" by "com[ing]
27 forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec.*

1 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed.R.Civ.P. 56(e)).
2 A dispute about a fact is “genuine” if the evidence is such that a reasonable jury could return
3 a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
4 (1986). The non-movant’s bare assertions, standing alone, are insufficient to create a
5 material issue of fact and defeat a motion for summary judgment. *Id.* at 247-48. However,
6 in the summary judgment context, the Court construes all disputed facts in the light most
7 favorable to the non-moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir.
8 2004).

9 **III. ANALYSIS AND CONCLUSION**

10 Defendants moved for summary judgment on all of Plaintiff’s remaining claims – the
11 Title IX claim against the District and the §1983 claims against the individuals. In her
12 response, Plaintiff argued only for her retaliation claims under Title IX and the Equal
13 Protection Clause. She therefore has waived all other claims she may have stated in the First
14 Amended Complaint. *Jenkins v. County of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir.
15 2005)(the plaintiff “abandoned her other two claims by not raising them in opposition to the
16 . . . motion for summary judgment.”).

17 **A. TITLE IX**

18 Title IX provides: “No person shall, on the basis of sex, be excluded from
19 participation in, be denied the benefits of, or be subjected to discrimination under any
20 education program or activity receiving federal assistance.” 20 U.S.C. §1681(a). Title IX
21 allows for a private right of action against federal fund recipients, i.e., school districts, for
22 gender discrimination in education, but not against school officials, teachers, and other
23 individuals. *Fitzgerald*, 129 S.Ct. at 796. A school district may be liable under Title IX,
24 however, if it acts with deliberate indifference toward discrimination by a school official or
25 teacher or student-on-student discrimination/harassment. *See e.g., Davis v. Monroe County*
26 *Bd. of Ed.*, 526 U.S. 629, 646-47 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S.
27 274, 287-88 (1998). Title IX also encompasses a cause of action for retaliation against a
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1 person who complains of discrimination at an educational institution. *Jackson v.*
2 *Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005)(“Retaliation is, by definition, an
3 intentional act. It is a form of ‘discrimination’ because the complainant is being subjected
4 to differential treatment.”).

5 Because Title IX was enacted under the Spending Clause, private actions are available
6 only when funding recipients, such as school districts, had adequate notice that they could
7 be held liable for the conduct at issue. *Davis*, 526 U.S. at 640. School districts are liable for
8 teacher-student or student-student harassment only if the district: 1) had actual knowledge
9 of the harassment and 2) responded to that knowledge with deliberate indifference. *Reese*
10 *v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). The school district’s
11 deliberate indifference must, “‘at a minimum, cause students to undergo harassment or make
12 them liable or vulnerable to it.’” *Id.* (quoting *Davis*, 526 U.S. at 645).

13 When the harasser is a fellow student, it may be harder for the plaintiff to prove a
14 school district’s liability under Title IX than when the harasser is a teacher or other school
15 official because of control issues. “Deliberate indifference makes sense . . . only where the
16 funding recipient has some control over the alleged harassment. A recipient cannot be
17 directly liable for its indifference where it lacks the authority to take remedial action.” *Davis*,
18 526 U.S. at 644. A district can only be liable if the district exercises substantial control over
19 the harasser and the context in which the known harassment occurs. *Id.* at 645. “Only then
20 can the [district] be said to ‘expose’ its students to harassment or ‘cause’ them to undergo it
21 ‘under’ the [district’s] programs.” *Id.*

22 Moreover, to be actionable, the conduct must be so “severe, pervasive, and objectively
23 offensive,” that it effectively deprives the victim of access to the educational opportunities
24 or benefits provided by the school. *Id.* at 650. Whether gender-based conduct rises to the
25 level of harassment depends on the surrounding circumstances, expectations, and
26 relationships; including, the ages of the harasser and the victim and the number of individuals
27 involved. *Id.* at 651. The Court must remain mindful that school children may regularly
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1 interact in a manner that adults would find unacceptable. *Id.* In the school setting:

2 [S]tudents often engage in insults, banter, teasing, shoving,
3 pushing, and gender-specific conduct that is upsetting to the
4 students subjected to it. Damages are not available for simple
5 acts of teasing and name-calling among school children,
6 however, even where these comments target differences in
gender. Rather, in the context of student-on-student harassment,
damages are available only where the behavior is so severe,
pervasive and objectively offensive that it denies its victims the
equal access to education that Title IX is designed to protect.

7 *Id.* at 651-52.

8 The Court also stresses that it will not act as a Super-Administrator and second guess
9 the disciplinary actions of a school. Schools must retain sufficient flexibility to make their
10 own disciplinary decisions. *Id.* at 648. A school district's response to reported harassment
11 will be deemed "deliberately indifferent" only if the district's response to the harassment or
12 lack thereof is clearly unreasonable in the light of known circumstances. *Id.* The Court may
13 determine as a matter of law whether a school's response was clearly unreasonable. *Id.* at
14 649.

15 Plaintiff has made a claim against the Gilbert School District for retaliation under Title
16 IX. The Court therefore must analyze whether the District had actual knowledge of
17 retaliation against Madison that was within the District's ability to control and, if so, whether
18 the District's response to the reported retaliation was clearly unreasonable.

19 This case arises from Madison's report of in appropriate comments of a sexual nature
20 by Mr. Gonzales. After investigating Madison's allegations, the District decided not to
21 renew Mr. Gonzales's coaching contract. Mrs. Gonzales felt that Madison had gotten her
22 husband fired and, as a result, allegedly retaliated against Madison.

23 Madison has alleged that Mrs. Gonzales attempted to garner support for Mr. Gonzales
24 among the other varsity players by making statements, like, "Josh would never say something
25 like that." Also, after Josh was fired, Mrs. Gonzales told another mother, with regard to
26 summer of 2006 basketball activities, that Madison better not have the nerve "to show up in
27 her gym again."

1 Madison claims that Mrs. Gonzales kept her out of basketball activities during the
2 summer of 2006, but Madison also testified that one of the reasons she did not attend
3 activities is because she did not receive an informational flyer. Mrs. Gonzales, however, did
4 not send out informational flyers to any of the varsity players. Madison also seems to
5 suggest that she did not make the varsity team for the 2006-2007 basketball season because
6 of the Josh situation. But the District has offered undisputed evidence that Mrs. Gonzales
7 did not take part in the selection of teams for the 2006-2007 season. In addition, both Dr.
8 Allison and Dr. Barrett personally attended the tryouts to monitor them for fairness.

9 The District did not ignore Mrs. Gonzales's conduct. Both Dr. Allison and Mr. Scanio
10 spent many hours meeting with Madison, her parents, and Mrs. Gonzales trying to resolve
11 the situation. Dr. Allison ultimately found sufficient grounds existed to discipline Mrs.
12 Gonzales. He issued her a letter of reprimand for lack of judgment and unprofessional
13 behavior, which remains in her personnel file to this day. The letter informed Mrs. Gonzales
14 that any further incident would result in additional discipline, up to and including her
15 dismissal.

16 The Court will not second guess the District's decision not to take more drastic
17 disciplinary measures against Mrs. Gonzales. The Court finds that the District's
18 investigation into the claims against Mrs. Gonzales and its ultimate action with regard to her
19 were not clearly unreasonable. The District did not act with deliberate indifference toward
20 Madison's allegations against Mrs. Gonzales.

21 As stated earlier, it may be more difficult to prevail on a student-on-student
22 harassment claim because of a school district's inability to control the harasser or the setting
23 of the harassment and the tendency of school children to act and speak in ways that adults
24 consider inappropriate. Madison has alleged several incidents of retaliation by her peers: one
25 of the other players was overheard threatening to be more rough with Madison and later that
26 player committed a "hard foul" against Madison at practice; a player wrote on her MySpace
27 page that Madison was a "bitch"; varsity players would stick their legs out in front of
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1 Madison as she attempted to walk down the bus aisle; a varsity player pointed to Madison
2 as she was walking down the hall in school and said, “bitch”; and, one day, some varsity
3 players followed behind Madison as she walked down the hall and stepped on the back of her
4 flip flops.

5 With regard to the threats made about Madison,¹ the District tasked Garrett Tinsdale,
6 the school resource officer, with investigating the threats. Officer Tinsdale met with Cori
7 Haws and Melissa Spaich about their alleged threats. The girls admitted they were upset
8 with Madison over Josh’s firing, but denied they had said anything to her. Officer Tinsdale
9 told the girls that the school had made the decision to fire Josh, not Madison. Officer
10 Tinsdale concluded that no sufficient evidence existed for formal charging. Melissa Spaich
11 also allegedly made a “hard foul” against Madison at practice. The School District certainly
12 would have a hard time monitoring and disciplining for isolated “hard fouls” in sports.

13 Madison has introduced evidence that one of the varsity players called her a “bitch”
14 on that player’s MySpace page. But the District cannot exercise control over what students
15 post on web site from a private computer and therefore could not have disciplined the player
16 for her post. Nonetheless, Mrs. Gonzales met with the player at issue after the post and told
17 her that she needed to move on from any bad feelings toward Madison for the firing of Mr.
18 Gonzales.

19 Madison has alleged that the varsity players would stick their legs in front of her on
20 the bus. The District has not denied that this occurred. While the leg blocking was definitely
21 obnoxious teenage behavior, the Court does not think that behavior is severe enough to rise
22 to the level of harassment.

23 Madison alleges that a student called her a “bitch” at school. Mr. Scanio questioned
24 the student at issue, but she denied having used that word. Mr. Scanio told the student’s
25 parents about the report and advised that student that she could be disciplined if she did not

27 ¹Madison has presented no evidence that any of the girls made threats to her face.
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1 keep her distance from Madison.

2 Mr. Scanio also investigated the alleged flip-flop incident. When he questioned the
3 students who allegedly stepped on Madison's flip-flops, they denied having done it. Mr.
4 Scanio checked to see if any of the school's security cameras caught the alleged incident on
5 tape, but found nothing. He nonetheless advised the students that they too could be
6 disciplined if they did not stay away from Madison and again notified their parents.

7 The Court sympathizes with Madison and understands why she would find her fellow
8 students' behavior toward her upsetting. Teenagers certainly can be very cruel. However,
9 the Court does not find that the students' behavior was so "severe, pervasive, and objectively
10 offensive," that it effectively deprived Madison access to her school's educational
11 opportunities or benefits.

12 But even if the students' behavior rose to the level of actionable harassment or
13 retaliation, the Court finds as a matter of law that the District's response to the alleged
14 retaliation was not clearly unreasonable given the circumstances. The District diligently
15 investigated the complaints against Mrs. Gonzales and the female students. The District
16 meted out punishment, namely warnings, that it found appropriate in light of its
17 investigations. While the District certainly could have punished both Mrs. Gonzales and
18 some of the students more severely, the Court will not second guess the District's decisions
19 given the reasonableness of the District's response to the situation. Madison has not
20 demonstrated that the District reacted to her complaints with deliberate indifference. The
21 Court therefore grants summary judgment to the District on Plaintiff's Title IX retaliation
22 claims.

23 **B. §1983 - Equal Protection**

24 Madison claims that the District and the individual Defendants violated her
25 constitutional right to equal protection by retaliating against her for reporting Mr. Gonzales's
26 inappropriate sexual remarks. She makes this claim under 42 U.S.C. §1983, which provides
27 in relevant part that "[e]very person who, under color of [state law,] subjects . . . any . . .
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1 person . . . to the deprivation of any rights, privileges, or immunities secured by the
2 Constitution and laws, shall be liable to the party injured”

3 Madison cites to *Fitzgerald v. Barnstable* for the proposition that Title IX does not
4 preclude §1983 claims for violations of the Equal Protection Clause occurring at educational
5 institutions. She further states, “[G]iven the close relationship between Title IX and Title VII
6 noted above, the same standards governing sexual harassment and retaliation under Title IX
7 also control the constitutional violations in this matter.” Madison provides no cite for that
8 proposition.

9 The Court agrees that after *Barnstable*, Title IX clearly does not preclude §1983 suits
10 based on equal protection violations. But *Barnstable* did not involve retaliation claims,
11 which is the §1983 claim remaining here.² Plaintiff did not cite and the Court could not find
12 any published Ninth Circuit Court of Appeals opinions allowing for a retaliation claim under
13 the Equal Protection Clause. Published opinions from other Circuits, however, specifically
14 hold that no such claim exists. *See, e.g., Thomas v. Independence Township*, 463 F.3d 285,
15 298 n.6 (3rd Cir. 2006)(“However, a pure or generic retaliation claim simply does not
16 implicate the Equal Protection Clause); *Maldonado v. City of Altus*, 433 F.3d 1294, 1308
17 (10th Cir. 2006)(“To the extent that Plaintiffs raise their retaliation claim under 42 U.S.C.
18 §1983, asserting violations of equal protection, we have long held that such a theory of
19 liability for retaliatory conduct does not come within §1983), overruled on other grounds by
20 *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Ratliff v. Dekalb County,*
21 *Georgia*, 62 F.3d 338, 340 (11th Cir. 1995)(“[N]o clearly established right exists under the
22 equal protection clause to be free from retaliation.”).

23 Because Plaintiff has not provided the Court with any legal basis for a retaliation
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25 ²The Court notes that Plaintiff perhaps could have survived this Motion on her §1983
26 equal protection discrimination claim against Mr. Gonzales and/or a First Amendment
27 retaliation claim against the Defendant, but she did not preserve those claims in her Response
28 to the Motion.


1 claim under the Equal Protection Clause, the only §1983 claim she did not abandon in her
2 Response to the Motion for Summary Judgment, the Court will grant summary judgment to
3 all Defendants on Plaintiff's §1983 claim.

4 Accordingly,

5 IT IS ORDERED Granting Defendants' Motion for Summary Judgment (Doc. #79).

6 DATED this 21st day of December, 2009.

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James A. Teilborg
United States District Judge